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IN THE

Supreme Court of the United States

October Term, 1962

No. 723

MEL DAR CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITIONER'S REPLY MEMORANDUM.

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The petition raises two important "bread and butter" tax questions:

1. Whether in the face of *United States v. Consolidated Edison Co.*, 366 U. S. 380, the mere physical payment of a deductible expense accrues it, where, prior to filing its return for the year of payment, taxpayer has secured an adjudication that it be reimbursed for such expense by another.

2. Whether an otherwise deductible legal expense resulting from a successful complaint for reimbursement of income forfeits such deducibility merely because it is tried under the same caption as a prior "title" trial.

Respondent's discussion of the first question presents merely its assertions that: (1) the case of *United States v. Consolidated Edison Co.*, 366 U. S. 380 (which ex-

pressly disapproved the authority relied upon by the Courts below) has a limited, narrow scope; and, (2) that petitioner's adjudicated right to reimbursement was "inchoate and contingent" unless later confirmed on appeal. Respondent's attempted limitation of the *Consolidated Edison* doctrine to primary liability cases ignores the long-settled rule that secondary liability of another party for the expense in question will defeat the claim of the payor for a deduction in the year of payment. *Smith v. United States*, 135 F. Supp. 694 (D.N.H. 1955); *Standard Oil Co. of New Jersey*, 7 T. C. 1310 (1946); *Estate of Elmer B. Boyd*, 28 T. C. 564 (1957). And surely, a final judgment for reimbursement (at least until reversed) is not "inchoate and contingent", even though an appeal is pending.

Respondent's "factual" discussion of the second question—the deductibility of the petitioner's legal expenses of seeking such reimbursement—is flawed by so many egregious misstatements of the record, that we are constrained to demonstrate this situation by laying such argument alongside the record and comparing them.

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". . . It seems evident that, as between the parties, *the cost of defending the Mar-Tex suit* was the responsibility of the Burnetts. As the courts below held, however, *the expenditures* would be non-deductible capital expenditures even if properly paid by the cor-	". . . *Mel Day intervened* in the Mar-Tex suit *after Mar-Tex had obtained a favorable jury verdict* [on the 'title' question] . . . *This was the so-called second phase of* the Mar-Tex suit . . . The Tax Court did not rule on the former ground" [The Commis-

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poration." (Brief, pp. 2-3.) (Italics ours.)

"From the petitioner-lessee's point of view, *the cost of defeating Mar-Tex's suit was the cost of perfecting its own title* or 'working interest' which it had originally acquired with notice of Mar-Tex's claim of a prior right to the lease." (Brief, p. 3.) (Italics ours.)

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sioner's claim that such expenses were the Burnetts' in view of its determination that the latter ground [capital expenditures] was meritorious . . . We agree." [Court of Appeals' Opinion, R. 467, 475-476.] (Italics ours.)

"The Mar-Tex suit was divided into two phases, the first [between Mar-Tex and the Burnetts] being whether there was a valid lease or contract to deliver such lease. The second phase, contingent on victory for Mar-Tex in the first phase involved the right of the defendants to reimbursement." [Tax Court Opinion, R. 196-197.]

"On November 7, 1950, the jury decided this issue [the 'title'] in favor of Mar-Tex . . . On April 30, 1951 Mel Dar intervened . . . claiming reimbursement . . . This was the second phase . . . On August 1, 1951 the court entered judgment upon the verdict for Mar-Tex . . . and judg-

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ment was entered for the Burnetts and Mel Dar holding that they were entitled to reimbursement for the $513,000 expended by Mel Dar up to that time for development.". [Court of Appeals' Opinion, R. 467.]

". . . *the jury verdict of November 1950 forced Mel Dar to actively pursue the accounting, i.e. reimbursables phase* . . ." [Tax Court Opinion, R. 233.] (Italics ours.)

"And costs incurred in defending or perfecting title to property are non-deductible capital expenses. Treas. Regs. 118 (1939 Code), §39.23 (a) — 15 (k)." (Brief, p. 3.)

Regulations 118, §39.23 (a) — 15 (k) also provide that expenses of recovering "amounts of income which, if and when recovered, must be included in income" as well as that portion of attorneys' fees in a quiet title suit properly allocable to "collecting rents" are deductible.

"Whether petitioner should be allowed to deduct the costs incurred specifically in the *separate trial* had to establish the expenses for which it would be entitled to reimbursement if Mar-

Mel Dar did not claim a deduction for the Burnetts' expenses of the first or "title" trial. Mel Dar did claim a deduction for the expenses of its successful intervention after the title

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Tex ultimately prevailed is less clear." (Brief, p. 3.) (Italics ours.)	issue was decided, which, after a second, "separate trial," resulted in a judgment for $513,000. [Stip. of Facts, R. 164-171; Tax Court Opinion, R. 208, 229.]
"That, however, [the 'separate trial'] was but a *relatively unimportant* part of the litigation . . ." (Brief, p. 3.) (Italics ours.)	The first or "title" trial occurred October 30 - November 7, 1950. The second or "reimbursables" trial occurred April 30-May 10, 1951. [Stip. of Facts, R. 122.] The final judgment, entered upon the verdict August 1, 1951, upholding Mar-Tex's title, was conditional upon reimbursement of the $513,000 development costs expended by Mel Dar. [Court of Appeals' Opinion, R. 467.]
". . . there are *no facts* in the record on which an apportionment between the two phases could be made." (Brief, p. 3.) (Italics ours.)	Respondent is confused. The ground of disallowance below, challenged herein, was not factual (lack of evidence) but legal—
	". . . All expenses of such suit are non-deductible capital expenditures, regardless of 'phase'." [Tax

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Court Opinion, R. 240-241.]

However, the voluminous evidence as to the identification of Mel Dar's expenses to the "separate" reimbursables trial [R. 164-171; Ex. 47-1 through 47-99; Ex. 48, 49] was not challenged below.

We are well aware of the pressing and competing claims upon the Court's time. However, we reiterate that the Commissioner has yet to deny that he disallows all taxpayers' claims for expense deductions pending litigation of claims for reimbursement thereof under the "all events" test. Surely, there should not be one law for the high and a different law for the low. As this Court has held from its very inception, justice is the same whether due from one man to a million or from a million to one man. *Chisholm v. Georgia*, 2 Dall. 419, 466.

The petition should be granted.

Dated: March 5, 1963.

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